IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 216

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALLIS-CHALMERS MANUFACTURING COMPANY AND INTERNATIONAL UNION, UAW-AFL-CIO (LOCALS 248 AND 401)

BRIEF OF ALLIS-CHALMERS MANUFACTURING COMPANY WITH RESPECT TO PETITION FOR CERTIORARI

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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Allis-Chalmers Manufacturing Company (Allis-Chalmers) files this Brief pursuant to Rule 24 in respect to the Petition for Writ of Certiorari filed by the Solicitor General on behalf of the National Labor Relations Board and the Union memorandum joining in

such Petition, Allis-Chalmers, however, submits that in view of (a) the absence of dispute as to the facts which were fully stipulated, (b) the comprehensive discussion of the controlling issues in the decision of the Court of Appeals for the Seventh Circuit sitting *en banc,* (c) the explicit statutory language and its prior application by this Court, and (d) the relevant decisions of other Courts of Appeals, it would be appropriate for this Court to grant certiorari and summarily to affirm the decision of the Court of Appeals for the Seventh Circuit.

Statement of the Case

The essential facts of this controversy can be stated with great simplicity. All the non-probationary employees in the relevant bargaining units of the Company have been members of the union pursuant to union security provisions in the applicable collective bargaining agreements. During economic strikes called by the union, the Company kept its doors open for any bargaining unit employees who elected to refrain from the strike and to work at their regular jobs. The union threatened that crossing the picket line and going to work constituted a violation of the union constitution punishable by a fine up to $100 and that each day of violation could constitute a separate offense. At the conclusion of each strike the union imposed fines upon members who had worked ranging up to $100. The union subsequently brought suit to collect the fines in the Wisconsin court as permitted by the existing Wisconsin precedents.

The statement of the case in the petition misstates the extent of the coercion shown here by focusing upon the imposition of fines long after the end of the strikes and ignoring the coercive union threat during the strike of a fine up to $100 for each day that an employee might

seek to work. The petition then seeks support from the union procedures for calling the strikes and imposing the fines, although the record casts a substantial cloud on the integrity of the strike vote procedures, and the court below properly found no need to review this irrelevant issue in reaching its conclusions.

The decision below is confined to the basic elements of the controversy. It finds a violation of Section 8(b)(1)(A) of the National Labor Relations Act when employees are threatened and fined by a union for crossing a picket line and working during a strike.

The Issue

The issue is whether a union, any more than an employer, may coerce an employee into abandoning a right guaranteed by Section 7 of the National Labor Relations Act.

In this case the right was to refrain from striking. In other recent cases it was the right to produce up to one's ability and the right to invoke the protections of the Act.

In all cases the consequence of the union coercion is the same: the individual employee's freedom to think and to choose for himself is replaced by the compulsion to do what he is told.

The Decision Below

On the critical point of statutory construction, the Court majority noted:

> "The statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification. The wording used evolved out of extensive Congressional debate and study. Although in our original opinion we re-

jected a literal reading of the statutes, in effect, we conceded that such a literal reading would require reversal of the Board's order." Appendix A to the Petition, p. 7a.

The concepts in the National Labor Relations Board petition demonstrate a painfully involved process of rationalizations in order to justify a particular result. The respondent respectfully suggests that the policy determinations have been made by Congress and that the Court below correctly applied the explicit statutory resolution of the policy questions.

ARGUMENT

There is no need for full review by this Court of the Opinion of the Court of Appeals. The respective positions, philosophies and arguments were exhaustively examined by the Court of Appeals sitting *en banc* and the present petition presents nothing new. The decision reached below is in harmony with the statute, prior decisions of this Court and related decisions and opinions of three other Courts of Appeals. This Court should affirm the decision of the Court of Appeals upon the record and majority opinion below.

Congress prohibited coercion of employees in the exercise of their right to refrain from collective activities. A threat of a union fine of up to $100 a day simply because an employee chooses to work during a strike is concededly coercive. The decision to work during a strike is clearly the exercise of the right to refrain from a concerted activity.

The petition concedes that the statute protects employee job rights against coercion. Yet it implies that Congress closed the front door against union coercion

of membership subservience by prohibiting threat of job loss but deliberately left the back door wide open by permitting threat of a confiscatory fine potentially many times daily earnings.

The petition for certiorari is based upon gross misconceptions as to the philosophy and purpose of our national labor laws. The petition argues from the following basic statement:

> "The court below misinterpreted Section 8(b)(1)(A) of the National Labor Relations Act in holding that the invocation of union disciplinary proceedings to penalize conduct unquestionably inimical to the effective functioning of the union in pursuit of its legitimate goals constitutes restraint or coercion within the meaning of that section." Petition, pp. 6-7.

This basic thesis of the petition must fall because it is based upon two untenable assumptions, first that the National Labor Relations Act protects unions in pursuit of their goals rather than employees in pursuit of their goals and second, that the power to coerce member action should have governmental sanction because this would aid effective functioning of a union even to the extent of overriding the express statutory guarantee of rights to employees.

Section 7 of the National Labor Relations Act does not guarantee rights to unions. Rather it guarantees to employees the right either to engage in or refrain from "any or all" concerted activities. Section 8(b)(1)(A), with which we are here concerned, was not enacted to further the "effective functioning of the union in pursuit of its legitimate goals." It was enacted to protect the exercise of statutory rights by employees from restraint and coercion by labor unions. The statute is clear and the court below so found.

The implication in the petition for certiorari that coercive tactics of labor unions against individual members should be sanctioned and encouraged by this Court as an aid to "effective functioning" of a union, strikes at the very heart of our democratic concepts. The recent decisions of this Court in the areas of criminal law enforcement and human rights reject the notion that "effective functioning" of our society is furthered by sacrificing individual rights and freedom of choice.

The Statutory Elements

The statute proscribes restraint and coercion by unions against employees in the exercise of their right to engage in or refrain from concerted activities. That these statutory elements exist here cannot be disputed.

The attempt of the petitioners to minimize the extent of the restraint and coercion is misplaced. It is not just the ultimate $100 fine which is in dispute. The record is clear that the union threatened the employees that the $100 fine could be imposed with respect to each crossing of the picket lines. As the court below observed:

> "The maximum fine permitted under the union constitution was $100 with each crossing of the picket lines treated as a separate offense. Consecutive fines may run into thousands of dollars creating a far greater burden on the workingman than expulsion from his labor organization or even loss of job." (Appendix A to the Petition, p. 3a.)

The purpose of the threats and fines was to prevent employees from exercising their statutory right to work during a strike. The statute rejects the notion of a coercively enforced strike. Each employee is guaranteed the right to refrain from "any or all" concerted activities.

This right is not diminished because the union did or did not have a proper strike vote, did or did not strike in pursuit of a lawful objective or did or did not claim the employees as members.

The claim that the union strike vote procedures properly reflected the will of the members was rebutted by the exhibits to the Stipulation of Facts below. But whatever view is taken of the particular procedures that were followed here, this factor is clearly not a relevant test of the intent of Congress. The statute applies to all unions and all employees. It does not distinguish between unions following one procedure or another or between strikes which are called in one particular manner or another. Rather it assures to employees the free choice whether to work or not to work regardless of what procedures are followed by a union in calling a strike and regardless of what the purpose of the strike may be. The statute recognizes that the only effective means to assure that union action is responsive to the will of all its members, is to guarantee to each employee the free choice whether to join in or refrain from each particular concerted activity.

Nor does an employee surrender the right to refrain from concerted activities when he joins a union. Membership of itself does not mean the surrender of all free choice. The statute gives each employee the right to refrain from "any or all" concerted activities. Under the statute the individual may be a "good, bad or indifferent member." *Radio Officers v. Labor Board,* 347 U.S. 17, 40.

The emphasis of the petitioners upon the supposed voluntary nature of union membership is likewise irrelevant. Whether membership is voluntary or involuntary

the individual joins the union under a statute which protects his right to refrain from any or all concerted activities. By his membership he assumes certain obligations to the union as an organization but these obligations do not extend to surrender of the rights granted and protected by the statute. The membership relationship assumes, and is subordinate to, the statutory rights.

Whatever view may be taken as to voluntary union membership, the issue is not presented on the present record. It is stipulated and the petition admits that the affected employees have been members of the union "pursuant to" union security provisions of the applicable collective bargaining agreements.

It is clear why Congress afforded the individual employee protection against coercion by his labor organization. Under the statute the majority representative bargains for him whether or not he consents. Under the statute and the collective bargaining agreement he is forced to pay dues and initiation fees. In the light of these special statutory privileges and the impact of union membership upon terms of employment, such membership can never be wholly voluntary in the same sense as membership in an organization such as a church or social club.

This Court has defined the scope of Section 8(b)(1)(A). So far as is relevant here the statute was held to be aimed at "particularized threats of economic reprisal." *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)* 362 U.S. 274, 287. It is inescapable that this statutory objective encompasses a threat of

a fine of up to $100 a day simply because an employee works at his regular job to earn a far lesser daily wage.[1]

The statute is clear and it may not be distorted by notions of policy contrary to those determined by the Congress. As this Court admonished in *The American Shipbuilding Co. v. NLRB,* 380 U.S. 300, 310:

> ". . . the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the board might think best conforms to the proper balance of bargaining power."

Decisions of Other Courts of Appeals

Three other Courts of Appeals have considered the basic question of the legality under the National Labor Relations Act of a union fine imposed upon a member in the exercise of his rights under the Act. These decisions are all in harmony with the decision sought to be reviewed here. No review by this Court is necessary and the principles established by the Courts of Appeals should be confirmed by a summary affirmance of the present decision.

In *Roberts v. NLRB,* 350 F. 2d 427 (1965) the Court of Appeals for the District of Columbia ruled that an unfair labor practice under Section 8(b)(1)(A) had been committed where a union imposed a fine upon a member because that member had previously filed NLRB charges with respect to another matter. This ruling of the court of necessity confirms that a union fine is a coercion within the meaning of the statute, that the

[1] Contrary to the contentions of the petition, the *Curtis Bros.* decision does not limit the broad scope of §8(b)(1)(A). In the final analysis that decision merely holds that §8(b)(1)(A), which protects *employees* against coercion, covers direct union pressure against employees but does not extend to lawful union pressure, i.e. peaceful picketing, directed against an employer and seeking to compel employer action.

exercise of a statutory right is protected against such coercion, and that membership in a union does not deprive an individual employee of the statutory protection against this form of coercion.

More recently the Court of Appeals for the Third Circuit had occasion to consider this issue in the case of *Leeds & Northrup Company v. NLRB*, 357 F. 2d 527 (1966). Although that decision principally involved procedural questions the court made the following comment with respect to union fines imposed upon employees who refrained from a strike:

> "But to equate union fines with total wages earned by a non-striking employee is the grossest form of economic coercion affecting not only the union membership status but also the relationship between the employee and his employer in violation of the Act. Such economic coercion is calculated in design and effect to force an employee to act in concert with the union in future labor-management strife. Congress has imposed strict limitation on compulsory unionism, and the Supreme Court has determined the obligation of union membership to be confined solely to the payment of dues." 357 F. 2d at 536.

This issue was also exhaustively reviewed by the Court of Appeals for the Ninth Circuit in *Associated Home Builders of the Greater East Bay, Inc. v. NLRB*, 352 F. 2d 745 (1965). The issue presented there was the validity of union fines imposed upon employees for alleged violations of a union-imposed rule limiting individual productive output. While the court ultimately left the Section 8(b)(1)(A) issue unresolved in favor of a different approach to the problem, its extensive review and analysis of the Section 8(b)(1)(A) problem is consistent with the approach adopted by the Court of Appeals for the Seventh Circuit in the instant case.

The foregoing decisions of the Courts of Appeals stand in harmony with each other, with the statute, and with the relevant decisions of this Court. The present petition presents an appropriate vehicle for a summary affirmance of the views expressed in the majority opinion below. This case had the fullest possible consideration by the Court of Appeals *en banc* and the summary affirmance of the decision is warranted.

Subsidiary Issues

The respective petitions of the Solicitor General and the union attempt to reargue matters of policy and legislative history which were fully considered below. No purpose will be served by again answering each of these contentions. The opinion of the Court of Appeals is a complete statement of why these arguments must be rejected. However, certain points deserve comment.

The petition quotes certain limited statements from the legislative debate. The quotation from Senator Taft at page 9 of the petition was found inapplicable by the Court below. Appendix A to Petition, p. 5a.

Other statements by Senator Taft explicitly support the decision below. In particular, in his analysis of the conference agreement on the Act, Senator Taft revealed that the express language in Section 7 as to the right of employees to refrain from concerted activities was added to the Senate bill because:

> "The House conferees insisted that there be express language in Section 7 which would make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." Legislative History of the Labor Management Relations Act, 1947, p. 1623.

The petition quotes from Senator Ball with respect to the thrust of Section 8(b)(1)(A) against improper organizational activities. While this was one purpose of the enactment it certainly was not the sole purpose and employees who became union members did not thereby forfeit their statutory protection.[1] In fact during the Senate debate Senator Pepper complained that Section 8(b)(1)(A) was "an effort to protect the workers against their own leaders, chosen by them under their own constitution and by-laws." This interpretation was not disclaimed by the sponsors of the amendment. Rather Senator Taft stated:

> "If there is anything clear in the development of labor union history in the past ten years, it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders. Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment proposed by the Senator from Minnesota [Section 8(b)(1)(A)]." Legislative History of the Labor Management Relations Act, p. 1028, 1030.

The reliance of the petition upon the subsequent enactment of the Labor Management Reporting and Disclosure Act (LMRDA) is misplaced. This Act was intended to give union members greater rights and privileges in their dealings with their labor unions and was certainly not intended to restrict those rights. No re-

[1] The Board's own decision in the closely related case of Local 138, Operating Engineers (Charles S. Skura) 148 N.L.R.B. 679 (1964) confirms that §8(b)(1)(A) protects union *members* against coercive fines for exercising rights under the Act.

course to legislative history is required to determine this intent since Section 103 of the LMRDA specifies:

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any state or federal law or before any court or other tribunal, or under the constitution and by-laws of any labor organization."

In the hearings of LMRDA, in the debates and in the terms of the statute, Congress expressed its concern for the protection of the rights of the individual in relation to his organized union leadership. While Congress left room for enforcement of reasonable union rules, it is specious to contend that a union rule could be deemed "reasonable" in the contemplation of Congress when its enforcement nullifies a right guaranteed by Congress.

Although the proviso to Section 8(b)(1)(A) allows a union the power to expel its members, there is no inconsistency in concluding that Congress intended to permit this power while restricting the power to fine or otherwise coerce employees. Congress may have believed that a union required protection against dissident members boring from within. Congress may have believed that no organization should be required to extend the privileges of membership to anyone who is not in sympathy with its policies. But such Congressional purposes imply no support for union fines. A fine is a pure coercion designed not to protect the union but to control the employee.

The petition finds it "anomalous" for Congress to permit expulsions while excluding fines. Such a view ignores the practicalities. The coercive force of the power to fine as compared with expulsion was dramatically admitted by the argument of counsel for the union here that

"a sanction such as, 'you are no longer a member of this union,' means nothing and is of no consequence and probably could well be a relief to some people" and the union control of the conduct of its members "can only be enforced" through the methods used here. (See the Transcript pp. 22-23, quoted in the Brief of Allis-Chalmers Manufacturing Company to the Court of Appeals, pp. 44-45.) When faced with possible expulsion the employee can freely choose whether he values his union membership more than he values his right to work, but when faced with enforceable threats of financial sanctions far greater than his total earnings if he exercises his right to work, all reasonable freedom of choice is foreclosed and he is compelled to bend to the union dictate.[1]

The case of *NLRB v. UAW*, 320 F. 2d 12 has no relevance here. The court there was dealing with a question of union procedural rules governing resignation from union membership. This matter was clearly within the scope of the proviso to Section 8(b)(1)(A) and thus there is no inconsistency whatever between that decision and the decision here.

The petition of the union professes a concern for the effect of the decision upon union power to discipline and control wildcat strikers. Suffice it to say that this issue is not involved in the present case. Protection of the right to refrain from striking does not of itself establish a similar protection for wildcat strikers. Section 7 was not so intended. Cf. *NLRB v. Sunbeam Lighting Company, Inc.* (7th Cir., 1963) 318 F. 2d 661.

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[1]The petition speculates on the possible loss of union benefits which could flow from expulsion. The record is wholly silent on this subject. Such speculation furnishes no basis for interpreting a statute applicable to all labor organizations, many of which may provide no such benefits.

Conclusion

An employee may wish to exercise his statutory right to refrain from a strike for a variety of perfectly good reasons ranging from distrust that the union leadership was advancing not employee interests but rather personal political motivations or even subversive interests, to mishandling of the strike vote procedures, or simply the belief that the strike had no economic justification or would cause too great a personal loss. Whatever the reason, Congress protected the individual employee's freedom of choice and prohibited coercive financial sanctions by unions to force an employee to strike.

Congress was concerned with the individual employee. The statutory protection is clear. The various Courts of Appeals have resolved the issue in favor of protection of the individual in the exercise of his statutory rights. The decision below was exhaustively reviewed by the Court of Appeals *en banc* and is worthy of summary affirmance.

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